No. 93-1021

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM W. EVANS,

Petitioner,

—v.—

UNITED ARAB SHIPPING COMPANY S.A.G.;
M/V AL WATTYAH, her engines, boilers, etc., in rem,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

CARY ROBERT WIENER*
LESLIE ANN MYROW
SABURABI N. IBRAHIM
KIRLIN CAMPBELL MEADOWS
& KEATING
14 Wall Street
New York, New York 10005
(212) 732-5520

Attorneys for Respondent

**Counsel of Record*

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QUESTIONS PRESENTED FOR REVIEW

Respondent, United Arab Shipping S.A.G., disagrees with the statement of the Questions Presented For Review by petitioner. The questions presented for consideration are:

1. Whether the United States Court of Appeals for the Third Circuit correctly determined that petitioner, a compulsory pilot, is not a Jones Act seaman and is not entitled to state a claim as such against respondent under the Jones Act, 46 U.S.C. app. sec. 688?

2. Whether the employment related connection to a vessel in navigation requirement necessary to obtain Jones Act seaman status is a separate and distinct requirement from the employer-employee relationship necessary to invoke the Jones Act?

3. Whether compulsory pilots on United States navigable waters must be either Jones Act seamen or longshore/harbor workers as opposed to seamen entitled to bring a cause of action under the general maritime law?

LIST OF INTERESTED PERSONS AND RULE 29.1 LIST

The parties to the proceeding below were petitioner/plaintiff, William W. Evans, and respondent/defendant, United Arab Shipping S.A.G., the owner of the M/V AL WATTYAH. Although petitioner named the vessel, the M/V AL WATTYAH, as a defendant, petitioner never served the master of the vessel. Thus, the vessel was not a party in the courts below and is not a party before this Court.

Pursuant to this Court's Rule 29.1, respondent, United Arab Shipping S.A.G. certifies that it is one hundred percent owned collectively by the governments of the United Arab Emirates, Bahrain, Saudi Arabia, Qatar and Kuwait. United Arab Shipping has no subsidiaries that are not wholly owned.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF INTERESTED PERSONS AND RULE 29.1 LIST.....	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE.....	2
REASONS FOR DENYING THE WRIT.....	3
I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IS CONSISTENT WITH ALL OTHER UNITED STATES COURTS OF APPEALS ON THE SAME MATTER.....	3
II. *McDERMOTT INTERNATIONAL, INC. V. WILANDER* MODIFIED ONLY THE THIRD ELEMENT OF THE JONES ACT STATUS TEST AND HAS NOT LEAD TO ANY CONFUSION IN THE COURTS	10
III. PILOTS DO NOT HAVE TO BE CLASSIFIED AS JONES ACT SEAMEN OR LONGSHORE/HARBOR WORKERS; THEY MAY BE CLASSIFIED AS SEAMEN UNDER THE GENERAL MARITIME LAW	19
CONCLUSION.....	21

TABLE OF AUTHORITIES

Cases PAGE

Ashley v. Epic Divers, 818 F. Supp. 172 (E.D. La. 1991), *aff'd mem.*, 976 F.2d 730 (5th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct 1415 (1993) 18

Bach v. Trident Shipping, 708 F. Supp. 772 (E.D. La. 1988,) *aff'd*, 920 F.2d 322 (5th Cir.), *vacated*, 499 U.S.__, 111 S. Ct. 2253 *reaffirmed on remand*, 947 F.2d 1290 (5th Cir. 1991), *cert. denied*, 504 U.S. __, 112 S. Ct. 1996 (1992)..... 5, 9

Baker v. Raymond International, 656 F.2d 173 (5th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982)..... 5

Barron v. Thunder Bay Offshore, Inc., No. 92-0358, 1992 WL 211704 (E.D. La. Aug. 13, 1992) 18

Bolden v. Offshore Express, 1992 A.M.C. 2043, 2046 (E.D. La. 1992) 18

Boyd v. Ford Motor, 948 F.2d 283 (6th Cir. 1991) ..11, 13-14

Bozeman v. Ensco Drilling Co., No. H-91-734, 1991 WL 216911 (S.D. Tx. Aug. 27, 1991)..... 18

Braen v. Pfeifer Oil Transport Co., 361 U.S. 129 (1960) 8-9

Campbell v. Offshore Pipeline, Inc., No. 92-1189, 1993 U.S. Dist. LEXIS 10966 (E.D. La. July 27, 1993) 4, 6

Campo v. Electro-Coal Transfer Co., 970 F.2d 51 (5th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 1262 (1993), *reh'g denied*, __ U.S. __, 113 S. Ct. 1883 (1993) 14, 15

Carumbo v. Cape Cod S.S. Co., 123 F.2d 991 (1st Cir. 1941) 10

PAGE

Cerqueira v. Cerqueira, 828 F.2d 863 (1st Cir. 1987). 5

Clark v. Solomon Navigation Ltd., 631 F. Supp. 1275 (S.D.N.Y. 1986) 10

Coats v. Penrod Drilling Corp., 5 F.3d 877 (5th Cir. 1993) 17

Coker v. Best Workover, Inc., No. 92-3123, 1993 U.S. Dist. LEXIS 10668 (E.D. La. July 23, 1993) 17

Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783 *reh'g denied*, 338 U.S. 389 (1949) 5

Daughdrill v. Diamond M. Drilling Co., 447 F.2d 781 (5th Cir. 1971) 10

Davis v. Odeco, No. 91-1694, 1992 U.S. Dist. LEXIS 5399 (E.D. La. Apr. 13, 1992) 18

Dean v. McKie, 771 F. Supp. 466 (D. Mass. 1991) 19

DiGiovanni v. Traylor Brothers, 959 F.2d 1119 (1st Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 87 (1992) 17

Dracos v. Hellenic Lines Ltd., 705 F.2d 1392 (4th Cir. 1983) 5

Ducote v. Keeler, 953 F.2d 1000 (5th Cir. 1992) 12

Easley v. Southern Shipbuilding Corp., 965 F.2d 1 (5th Cir. 1992) 14, 15, 17

Echols v. Elf Aquitane Exploration, Inc., 1992 A.M.C. 2760 (S.D. Tx. 1992) 18

Eckenrode v. Delton Demere, Nos. 86-4136, 86-4403, 1987 U.S. Dist. LEXIS (E.D. La. 1987) 6

Gazis v. John S. Latsis (USA) Inc., 729 F. Supp. 979 (S.D.N.Y. 1990) 6

PAGE

Gibson v. TCB Enterprises, Inc., No. 91-3941 (E.D. La. May 17, 1993) 16, 17

Guidry v. South Louisiana Contractors, Inc., 614 F.2d 447 (5th Cir. 1980) 6

Harwood v. Partredereit AF, 944 F.2d 1187 (4th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1265 (1992) 5, 10, 11, 13

Haskins v. Point Towing Co., 421 F.2d 532 (3d Cir.), *cert. denied*, 400 U.S. 834 (1970) 5

Haynie v. Dynamic Offshore Contractors, No. 89-4552, 1991 WL 87949 (E.D. La. 1991) 18

Higginbotham v. Monteiro Contractors, Inc., No. 92-2664, 1993 U.S. Dist. LEXIS 6923 (E.D. La. May 13, 1993) 17

Hodge v. Ocean Quest International Ltd., No. 90-4685, 1992 U.S. Dist. LEXIS 9523 (E.D. La. 1992) 6

Johnnie v. Nana Development Corp., 780 F. Supp. 669 (D. Alaska 1991) 18

Johnson v. John F. Beasley, 742 F.2d 1054 (7th Cir. 1984) 11

Kathriner v. Unisea, Inc., 975 F.2d 657 (9th Cir. 1992). 17

Klarman v. Santini, 503 F.2d 29 (2d Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975) 6

Kline v. Maritans CP, Inc., 791 F. Supp. 455 (D. Del. 1992) 6

Leotis v. City of New York, 818 F. Supp. 63 (S.D.N.Y. 1993) 17

PAGE

Machado v. George R. Brown Partnership, John Marceaux, and McMahan Construction, Inc., No. C14-92-00933-CV, 1993 Tex. App. LEXIS 1855 (Tex. Ct. App. July 1, 1993) 6, 19

Magnolia Towing v. Pace, 378 F.2d 12 (5th Cir. 1967) 10

Mahramas v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165 (2d Cir. 1973) 7, 22, 23.....6, 19, 20

Matute v. Lloyd Bermuda Lines, 931 F.2d 231 (3d Cir. 1991) 5

Maze v. "Aleutian Key", 1992 A.M.C. 1539 (E.D. La. 1991), *aff'd mem. sub nom., Maze v. Key*, 974 F.2d 172 (5th Cir. 1992)..... 19

McAleer v. Smith, 818 F. Supp. 486 (D.R.I. 1993)..... 6, 20

McDermott International v. Wilander, 498 U.S. 337 (1991) .....*passim*

McMahon, Jr. v. M/V TOMIS SEA, Hong Fat Shipping and Yick Fung Shipping & Enterprises Company, No. 92-2368 C/W 92-3314, 1993 U.S. Dist. LEXIS 7894 (E.D. La. May 28, 1993) 9, 20

Menard v. Brownie Drilling Co., No. 90-2559, 1991 WL 111028 (E.D. La. 1991)..... 18

Meyers v. M/V "EUGENIO C." 919 F.2d 1070 (5th Cir. 1990) 10

Michel v. Total Transport, Inc., 957 F.2d 186 (5th Cir. 1992) 17

Morris v. Massachusetts Maritime Academy, 565 N.E.2d 422 (Mass. 1991)..... 6

PAGE

Navarro v. Eckstein Marine Services, No. 91-1056, 1992 U.S. Dist. LEXIS 177 (E.D. La. Jan. 2, 1992).... 18

Newsom v. Continental Grain Company, 820 F. Supp. 1187 (D. Minn. 1993)..... 17

Offshore v. Robison, 266 F.2d 769 (5th Cir. 1988) 1, 10

Olene v. Otto Candies, No. A90-213 Civil, 1992 WL 80812 (D. Alaska 1992)..... 18

Palmer v. Fayard Moving and Transport, 930 F.2d 437 (5th Cir. 1991) 17

Pearson v. Offshore Specialty Fabricators, Inc., No. 91-3350, 1992 U.S. Dist. LEXIS 15246 (E.D. La. Oct. 6, 1992) 17

Pickett v. C&B Fabricators, Inc., No. 92-3470, 1992 WL 233770 (E.D. La. Aug. 29, 1992) 18

Ralleigh v. Gulf Island IV, Inc., No. 91-1305, 1992 U.S. Dist. LEXIS 9547 (E.D. La. June 19, 1992)..... 18

Ray v. Great Lakes Towing Co., Docket No. 3:, 92 Civ. 7034 (N.D. Ohio Feb. 25, 1992) 5, 10, 13

Ringering v. Compania Maritima De-La-Mancha, 670 F. Supp. 301 (D. Or. 1987), *aff'd mem.*, 848 F.2d 243 (9th Cir. 1988) 8

Rohde v. Southeastern Drilling Co. Inc. et al., 667 F.2d 1215 (5th Cir. 1982) 5

Roy v. Bethlehem Steel Corp., No. 1:92-CV-376, 1993 U.S. Dist. LEXIS 1647 (E.D. Tx. Oct. 1, 1993).... 17

Searcy v. E.T. Slider, Inc., 679 F.2d 614 (6th Cir.1982) 11

Seas Shipping Co. v. Sieracki, 238 U.S. 85 (1946) 20

PAGE

Southwest Marine Inc. v. Gizoni, __ U.S. __, 112 S. Ct. 486 (1991) 7, 11, 12

Spinks v. Chevron Oil Co., 507 F.2d 216 (5th Cir. 1975) 6

Stephenson v. McLean Contracting Co., 863 F.2d 340 (1988), *cert. denied*, 490 U.S. 1085 (1989) 11, 13

Stoller v. Evergreen International (U.S.A.) Corp., No. C92-0466 FMS (N.D. Cal. Sept. 1, 1992) 5, 14

Tate v. Zapata Gulf Marine Construction et al., No. 93-5, 1993 U.S. Dist. LEXIS 10980 (E.D. La. Aug. 2, 1993) 6

Taylor v. Cooper River Constructors, 830 F. Supp. 300 (D.S.C. 1993) 17

Texaco, Inc. v. Addison, 613 So. 2d 1193 (Miss. 1993) 19

Theriot v. McDermott, Inc., 611 So. 2d 129 (La. Ct. App. 1st Cir. 1992), *cert. denied*, 615 So. 2d 342 (La. 1993) 19

Trahan v. Thenamaris Ship Management, Inc., 614 So. 2d 362 (La. Ct. App. 3d Cir. 1993) 19

Trentacosta v. Frontier Pacific Aircraft Industries, Inc., 813 F.2d 1553 (9th Cir. 1987) 5

Tuckson v. Bunge Corp., No. 91-2794, 1992 WL 189502 (E.D. La. July 24, 1992) 18

Viger v. Geophysical Services, Inc., 476 F.2d 1288 (5th Cir. 1973) 6

Volyrakis v. M/V Isabelle, 668 F.2d 863 (5th Cir. 1982) 5

Wheatley v. Gladden, 660 F.2d 1024 (4th Cir. 1981) .. 6

Wilson v. Jotori Dredging, Inc., 999 F.2d 370 (8th Cir. 1993) 11

PAGE

Statutes

Jones Act, 46 U.S.C. app. sec. 688 ..... 1, 5, 6

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

Respondent, United Arab Shipping Company S.A.G., submits that there is no basis for granting a writ of certiorari in this case. The United States Court of Appeals for the Third Circuit applied a test that is consistent with the tests applied by all other United States Courts of Appeals for determining eligibility to state a cause of action under the Jones Act, 46 U.S.C. app. sec. 688, and correctly found that petitioner was not entitled to bring a Jones Act claim against respondent.

Furthermore, this Court in *McDermott International v. Wilander*, 498 U.S. 337 (1991), reviewed and approved the traditional Jones Act status test as articulated by the Fifth Circuit in *Offshore v. Robison*, 266 F.2d 769 (5th Cir. 1988). Post-McDermott decisions rely on the continued vitality of

the *Robison* test. Thus, this case does not justify issuance of a writ of certiorari.

STATEMENT OF THE CASE

Petitioner William W. Evans, a compulsory river pilot, brought this action against the shipowner, United Arab Shipping Company, claiming damages under the general maritime law for orthopedic and neurological injuries. Petitioner did not plead a Jones Act claim in his complaint, but raised it for the first time at the bench trial in the District Court.

Evans was engaged as a compulsory ship pilot by United Arab Shipping Company through the agency of the Delaware Bay & River Pilots' Association. Evans was a self-employed member of the Pilots' Association. He filed income tax returns for the years 1986-1989 as a self-employed taxpayer and not as an employee of any shipowner to whom he provided services. These tax returns were prepared by the same counsel representing him in this petition. Petitioner's sole engagement with respondent was on this subject voyage on September 10, 1989, lasting not more than six hours.

Evans fell while disembarking from the vessel and suffered only a fractured nose. He recovered sufficiently to return to work about one week later and continued piloting ships until he stopped working two months later.

The District Court for the District of New Jersey found that United Arab Shipping Company had aggravated Evans' pre-existing motor neuron disease, but reached this finding only because a Jones Act seaman's "featherweight" burden of proof as to causation applied. Had Evans been required to provide more than a "featherweight" burden of proof, the court itself said it would have found no aggravation. (Petitioner's A-46). The court placed the burden on Evans to segregate damages due to his pre-existing illness. The district court held that Evans failed to produce sufficient evidence to

establish the nature of his motor neuron disease and that he also failed to show the extent to which respondent's negligence may have aggravated his pre-existing neurological illness. The court therefore awarded Evans damages only in connection with his orthopedic injuries. Evans appealed the district court's assignment of the burden of proof on the aggravation issue and United Arab Shipping Company cross-appealed the district court's determination that petitioner was entitled to state a cause of action under the Jones Act.

On August 13, 1993, the U.S. Court of Appeals for the Third Circuit, using a test for Jones Act status consistent with the tests of all other circuits on the same matter, reversed the district court's finding that petitioner was entitled to the protection of the Jones Act. (Petitioner's A-3) Evans submitted a petition for rehearing, which was denied by the same panel and en banc by the Court of Appeals on September 22, 1993. (Petitioner's A-53).

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IS CONSISTENT WITH ALL OTHER UNITED STATES COURTS OF APPEALS ON THE SAME MATTER

The potential Jones Act claimant bears the burden to prove each and every element set out hereunder:

1. Claimant is an employee of the defendant; *and*
2. Claimant has a "permanent or substantial" connection with the defendant's vessel or fleet of vessels; *and*
3. Claimant's service aided in or contributed to the functioning of the vessel or accomplishment of its mission.

The first and second elements were not proven in this case, and therefore Evans failed to establish Jones Act status.

The United States Court of Appeals for the Third Circuit *reversed* the District Court's finding that pilot Evans was entitled to bring a Jones Act claim against respondent. The Third Circuit, reviewing the *first element* of the test above, found that "a compulsory river pilot such as Evans is not an employee of the vessel he pilots." (See Petition A-13) The Third Circuit chose not to decide the *second element* of the above test because Evans did not satisfy even the first element.

Although petitioner argues that the status of a pilot "has been left in a state of confusion by the split among the Circuits," there is in fact, no confusion, and all the Circuit Courts which have heard this issue have found that an independent pilot is *not* entitled to Jones Act remedies.

Petitioner has read with tunnel vision the various pilot and Jones Act status cases. Although the litmus test for Jones Act status is three-pronged, courts have examined only the prong(s) at issue before the courts. The fact that a case examines less than all the prongs, does not imply that the other prongs are not essential ingredients to the test. For example, in *Campbell v. Offshore Pipeline, Inc.*, No. 92-1189, 1993 U.S. Dist. LEXIS 10966 (E.D. La. July 27, 1993), once it was determined that the plaintiff failed to prove "permanent or substantial connection with the defendant's vessel or fleet of vessels," the Court found it unnecessary to reach the question of whether the requisite employer-employee relationship existed. By further illustration, it is not contested in the case before this Court that petitioner satisfied the third element (claimant's service aided in or contributed to the functioning of the vessel or accomplishment of its mission.) However, this does not suggest that the third element is not as important to the Jones Act test as the other two elements. Nor does it suggest that this third element is not required in order to satisfy the Jones Act test.

A prerequisite to a Jones Act claim is an employer-employee relationship and only an employer can have Jones Act liability. *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, *reh'g denied*, 338 U.S. 389 (1949); *see Campbell v. Offshore Pipeline, Inc.*, No. 92-1189, 1993 U.S. Dist. LEXIS 10966 (E.D. La. July 27, 1993). In *Haskins v. Point Towing Co.*, 421 F.2d 532 (3d Cir.), *cert. denied*, 400 U.S. 834 (1970), the Third Circuit held that the primary requisite to any recovery under the Jones Act is the establishment by the seaman of an employer-employee relationship with the defendant. If this requirement is not met, it is not necessary for the courts to review the other elements of the Jones Act test.

The petitioner suggests that there is confusion where there is none. Authorities (including the 1st, 2nd, 3rd, 4th, 5th and 9th Circuits) which confirm that claimant's **employer-employee** relationship with defendant is essential to a Jones Act action are legion. Suffice here for us to cite these other cases in summary fashion:

PILOT CASES—*Bach v. Trident Shipping*, 708 F. Supp. 772, 773, (E.D. La. 1988) *aff'd*, 920 F.2d 322 (5th Cir.), *vacated*, 499 U.S. __, 111 S.Ct. 2253, *reaffirmed on remand*, 947 F.2d 1290 (5th Cir. 1991), *cert. denied*, 504 U.S. __, 112 S. Ct. 1996 (1992); *Harwood v. Partredereit AF*, 944 F.2d 1187 (4th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1265 (1992); *Ray v. Great Lakes Towing Co.*, No. 92 Civ. 7034 (N.D. Ohio Feb. 25, 1992); *Stoller v. Evergreen Int'l (U.S.A.) Corp.*, No. C92-0466 FMS (N.D. Cal. Sept. 1, 1992);

APPEAL COURT CASES—*Matute v. Lloyd Bermuda Lines*, 931 F.2d 231 (3d Cir. 1991); *Trentacosta v. Frontier Pacific Aircraft Industries, Inc.*, 813 F.2d 1553 (9th Cir. 1987); *Cerqueira v. Cerqueira*, 828 F.2d 863 (1st Cir. 1987); *Dracos v. Hellenic Lines Ltd.*, 705 F.2d 1392 (4th Cir. 1983); *Volyrakis v. M/V Isabelle*, 668 F.2d 863 (5th Cir. 1982); *Rohde v. Southeastern Drilling Co. Inc. et al.*, 667 F.2d 1215 (5th Cir. 1982); *Baker v. Raymond Int'l*, 656 F.2d 173, 177 (5th

Cir. 1981), *cert. denied*, 456 U.S. 983 (1982); *Wheatley v. Gladden*, 660 F.2d 1024 (4th Cir. 1981); *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447 (5th Cir. 1980); *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975); *Klarman v. Santini*, 503 F.2d 29 (2d Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); *Viger v. Geophysical Services, Inc.*, 476 F.2d 1288 (5th Cir. 1973); *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2d Cir. 1973);

DISTRICT COURT CASES—*Tate v. Zapata Gulf Marine Construction et al.*, No. 93-5, 1993 U.S. Dist. LEXIS 10980 (E.D. La. August 2, 1993); *McAleer v. Smith*, 818 F. Supp. 486 (D.R.I. 1993); *Kline v. Maritans CP, Inc.*, 791 F. Supp. 455 (D. Del. 1992); *Hodge v. Ocean Quest Int'l. Ltd.*, No. 90-4685, 1992 U.S. Dist. LEXIS 9523 (E.D. La. 1992) ("Under the Jones Act, an employee/employer relationship must exist between the plaintiff and the defendant at the time of the accident."); *Gazis v. John S. Latsis (USA) Inc.*, 739 F. Supp. 979 (S.D.N.Y. 1990); *Eckenrode v. Delton Demolition*, Nos. 86-4136, 86-4403, 1987 U.S. Dist. LEXIS (E.D. La. 1987);

STATE COURT CASES APPLYING FEDERAL MARITIME LAW—*Morris v. Massachusetts Maritime Academy*, 565 N.E.2d 422 (Mass. 1991); *Machado v. George R. Brown Partnership, John Marceaux, and McMahan Construction, Inc.*, No. C14-92-00933-CV, 1993 Tex. App. LEXIS 1855 (Tex. Ct. App. July 1, 1993).[1]

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[1] Some courts include the employer-employee relationship as part of the three prong test for Jones Act seaman status. Other courts use a two-pronged test for Jones Act seaman status and then include the employer-employee relationship as a third element which is necessary to bring a Jones Act claim. No matter how the three prongs are grouped, *all* courts ultimately require *all* three prongs to be satisfied before a Jones Act claim may be brought. *See also Campbell v. Offshore Pipeline, Inc.*, No. 92-1189, U.S. Dist. LEXIS 10966, 12 (E.D. La. July 27, 1993). In addition, "many of the cases use the term 'shipowner' interchangeably with the term 'employer', but this is done only where the shipowner is the employer." *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165, 171 (2d Cir. 1973).

Far from seeking to secure or maintain uniformity between the Circuit Courts of Appeals, petitioner's attempt to dispense with the requirement for an employer-employee relationship in a Jones Act action calls for a complete reversal of established federal maritime law on this issue.

This Court's decision in *McDermott Int'l v. Wilander*, 498 U.S. 337 (1991), has already acknowledged that the underpinning of a Jones Act remedy is an employer-employee relationship between claimant and defendant. In *McDermott*, plaintiff was an "employee" of the shipowner. In *McDermott*, the discussion revolved around the nature of the employees' duty, i.e., the type of job. When this Court in *McDermott* discussed an "employment-related connection" between plaintiff and vessel, it used the term "employ" to mean "to use" someone as in "he was employed in advancing the mission of the vessel" rather than to mean employment, as in being an employee of the company or vessel:

> The key to seaman status is *employment-related connection* to a vessel in navigation. We are *not called upon* here *to define this connection in all details*, but we hold that *a necessary element of the connection* is that a seaman performs the work of a vessel . . . In this regard, we believe the requirement that an *employee's* duties must "contribute to the function of the vessel or to the accomplishment of its mission" captures well *an important requirement of seaman status* . . . . (emphasis supplied).

Id. at 355.

Similarly, in *Southwest Marine Inc. v. Gizoni*, __ U.S. __, 112 S. Ct. 486 (1991), this Court implicitly endorsed the employer-employee requirement in a Jones Act claim:

> "The 9th Circuit also found questions of fact to remain concerning whether Gizoni aided in the navigation of these platforms. After *McDermott Int'l v. Wilander*, however, only "employment-related connection to a ves-

> sel in navigation" is required. To be a seaman, the ***employee*** need not aid in navigation." (Citation omitted; emphasis supplied).

Id. at 494.

Petitioner states in his petition at page 9, that in *Ringering v. Compania Maritima De-La-Mancha*, 670 F. Supp 301 (D. Or. 1987), *aff'd mem.*, 848 F.2d 243 (9th Cir. 1988), the Ninth Circuit "affirmed a district court decision which had squarely held that river pilots were entitled to the protection of both the Jones Act and the warranty of seaworthiness." This is clearly a misstatement of the case. Prior to trial in the district court, plaintiff Ringering "***withdrew the Jones Act claims***". *Ringering*, 670 F. Supp. at 302 (emphasis added). In fact, similar to petitioner who was an independent contractor, Ringering was self-incorporated and employed by Merlin Ringering, Inc. Ringering recovered under theories of seaworthiness and negligence under the general maritime law, ***not under the Jones Act*** with its attendant special standard for burden of proof. The *Ringering* district court, using the traditional standard for negligence, stated: "To establish proximate cause, plaintiff must show that 'the act or omission played a *substantial* part in bringing about or actually causing the injury; and that the injury was either the direct result or reasonable probable consequence of the act or omission.' " *Ringering*, 670 F. Supp. at 305. This burden of proof is not the test utilized in a Jones Act case.

The employer-employee relation is essential because the Jones Act, a statute created to serve as a type of workers' compensation, is designed to protect certain seamen and to facilitate their recovery of damages based on negligence against their employer for injuries suffered in the course of their employment. It is the equivalent of the Federal Employers' Liability Act (FELA) which was created for railroad employees. The Jones Act remedy is only available to a seaman who is a master or member of the crew of a vessel. *Braen*

v. Pfeifer Oil Transp. Co., 361 U.S. 129 (1960). An injured party seeking to recover under the Jones Act must be a member of the vessel. A non-employee shares the same status as a non-seaman transitory maritime employee: they both fall outside the protected class of Jones Act seaman. For *non*-Jones Act seamen who are injured aboard the vessel in the course of their assignment, a cause of action may lie against the shipowner for negligence (but *not* Jones Act negligence) under the general maritime law. *See McMahon, Jr. v. M/V TOMIS SEA, Hong Fat Shipping and Yick Fung Shipping & Enterprises Company*, No. 92-2368 C/W 92-3314, 1993 U.S. Dist. LEXIS 7894 (E.D. La. May 28, 1993). *But no Jones Act remedy, with its "featherweight" burden of proof, is available* to the claimant against a shipowner who is not claimant's employer.

In all cases where members of pilots' associations have sought Jones Act remedies, their claims have been *consistently rejected* because of their independent contractor/non-employee status. They fail the litmus test of proving an "employment relationship" with a defendant shipowner.

The district court in *Bach v. Trident Shipping*, 708 F. Supp. 772, 773, *aff'd*, 920 F.2d 322 (5th Cir.), *vacated*, 499 U.S. __, 111 S. Ct. 2253, *reaffirmed on remand*, 947 F.2d 1290 (5th Cir. 1991), *cert. denied*, 504 U.S. __, 112 S. Ct. 1996 (1992), analyzed the plaintiff river pilot's alleged employment-relationship with the defendant shipowner and found none existed. (On appeal, Bach did not place in issue the employer-employee relationship.)

The district court in **Bach** *found that the pilot, a member of a Pilots' Association, was an independent contractor. Neither shipowner's right to refuse the pilot's services nor characterization of the pilot fee as "wages" was proof of an employment relationship; they are consistent with the pilot's status as an independent contractor.*

The district court in *Bach* distinguished cases where pilots were found to be Jones Act seamen on the ground that such

pilots were permanent, salaried employees. *See Magnolia Towing v. Pace*, 378 F.2d 12 (5th Cir. 1967); *Daughdrill v. Diamond M. Drilling Co.*, 447 F.2d 781 (5th Cir. 1971).

In *Harwood v. Partredereit AF*, 944 F.2d 1187, 1189 (4th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1265 (1992), the court found that a pilot who was a member and part owner of the Virginia Pilots' Association, *functioned as an independent contractor*, had no permanent or substantial connection to the vessel and consequently failed the Jones Act seaman status test. *See also Meyers v. M/V "EUGENIO C,"* 919 F.2d 1070 (5th Cir. 1990); *Ray v. Great Lakes Towing Co.*, Docket No. 3: 92 Civ. 7034 (N.D. Ohio Feb. 25, 1992); *Clark v. Solomon Navigation Ltd.*, 631 F. Supp. 1275 (S.D.N.Y. 1986) (pilot is not Jones Act seaman).

II. *McDERMOTT INTERNATIONAL, INC. V. WILANDER* MODIFIED ONLY THE THIRD ELEMENT OF THE JONES ACT STATUS TEST AND HAS NOT LEAD TO ANY CONFUSION IN THE COURTS

A review of the Circuit Courts shows that the finding by the Third Circuit, that an independent pilot such as petitioner is not entitled to Jones Act remedies, is consistent with the tests applied in the **First, Third, Fourth, Fifth, Sixth, Seventh, Eighth** and **Ninth** Circuits and that all Circuits restate the traditional common law requirement, without any substantial variations. *No Circuit* or *District Court* (except in this case) states otherwise.

The **Fifth Circuit** test articulated in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959) is perhaps the best known. It essentially requires the *employee* to prove: (1) he was *assigned permanently to a vessel or performed a substantial part of his work on the vessel*; and (2) he contributed to the function of the vessel or the accomplishment of its mission.

The **First Circuit** test in *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991, 995 (1st Cir. 1941) was the template for the Third Circuit test. The First Circuit requires: (1) that the ship

was in navigation; (2) that the *employee had a more or less permanent connection with the ship*; and (3) that the employee was aboard primarily to aid in navigation.[2]

The **Fourth Circuit** test, restated in *Stephenson v. McLean Contracting Co.*, 863 F.2d 340, 341 (1988), *cert. denied*, 490 U.S. 1085 (1989) requires that: (1) *worker was more or less permanently attached to the vessel or fleet of related vessels*; (2) worker's duties served naturally and primarily as an aid to navigation (see footnote 2 below); and (3) vessel was in navigation. *See also Harwood v. Partredereit AF*, 944 F.2d 1187 (4th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1265 (1992) (river pilot fails Fourth Circuit status test).

The **Sixth Circuit** test restated in *Searcy v. E.T. Slider, Inc.*, 679 F.2d 614, 616 (6th Cir.1982) (and recently applied in *Boyd v. Ford Motor Co.*, 948 F.2d 283 (6th Cir. 1991)) requires: (1) vessel was in navigation; (2) *employee* had a *more or less permanent connection with the vessel*; and (3) *employee* was on board the vessel primarily in aid of navigation (see footnote 2 below). *See also Johnson v. John F. Beasley*, 742 F.2d 1054, 1061 (**7th Cir.** 1984); *Wilson v. Jotori Dredging, Inc.*, 999 F.2d 370, 371 (**8th Cir.** 1993); *Southwest Marine v. Gizoni*, __ U.S. __, 112 S. Ct. 486 (1991) (appeal from the **9th Circuit**) which imposed similar requirements.

An essential and unvarying element in the tests adopted by these various Circuits is proof of the employee's connection to the vessel, which must be either *permanent or substantial*.

The district court below was misled by petitioner's misinterpretation of *McDermott International v. Wilander*, 498 U.S. 337 (1991) that:

> [T]he Supreme Court's recent decision in *McDermott* leads to the inevitable conclusion that the 'permanent

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[2] This prong of the test was subsequently modified by the *McDermott* decision.

> attachment' element of seaman status is no longer required; it is enough that plaintiff was employed to assist in the performance of the vessel's functions.
>
> (Petitioner A-37)

Petitioner continues this distorted view of *McDermott* when petitioner states "[T]his made it clear that so long as a claimant had an 'employment-related connection to a vessel in navigation', he or she was entitled to the Jones Act remedy." (Petitioner page 10.)

It is patently clear from all the post-*McDermott* authorities that, far from diminishing the traditional Jones Act status tests as articulated by the Fifth Circuit in *Robison*, *McDermott* reinforced the continuing validity of the test. Proof of petitioner's permanent or substantial attachment to the vessel or fleet of vessels is still an enduring requirement in order to establish Jones Act seaman status

In *Southwest Marine v. Gizoni*, __ U.S. __, 112 S. Ct. 486 (1991), this Court confirmed that the vessel-connection test of *Robison* was not jettisoned by *McDermott*. This Court agreed with two prongs of the three prongs required by the **Ninth Circuit** for seaman status. These prongs were: (1) whether the structures on which plaintiff worked were vessels in navigation; (2) whether *plaintiff's relationship with the structures was permanent. Id.* at 490. But as to the third prong, (3) whether plaintiff aided in the navigation, this Court noted that, "After [*McDermott*], however, only 'employment-related connection to a vessel in navigation' is required." *Id.* at 494 n.6.

In *Ducote v. Keeler*, 953 F.2d 1000, 1002 n. 2 (5th Cir. 1992), Judge Wisdom who authored the *Robison* test, implicitly acknowledged that *McDermott* did not discard the "permanent or substantial" vessel-connection element of the *Robison* test:

> A seaman has been defined for Jones Act purposes as an ***employee*** (1) who is *permanently assigned to a vessel or who performs a substantial part of his work on the vessel* and (2) whose duties contribute to the function of the vessel or to the accomplishment of its mission. *See*, e.g., *McDermott Int'l. . . .*" (citations omitted, emphasis supplied.)

In *Harwood v. Partredereit AF*, 944 F.2d 1187 (4th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1265 (1992), the Fourth Circuit analyzed the impact of *McDermott* on the Jones Act status test. As noted above, the Fourth Circuit *Stephenson* test demands all the essential requirements of the Fifth Circuit *Robison* test. The first prong of the *Stephenson* test requires that the "worker must be more or less permanently attached to a vessel or fleet." The Fourth Circuit in *Harwood* held:

> "In [*McDermott*], the Court stated that "master or member of a crew" should be defined "solely in terms of the employee's connection to a vessel in navigation." Thus, the Court reinforced the importance of the first prong of the *Stephenson* definition. Our holding in this case is consistent with the Court's opinion in *McDermott*. Since *Harwood was not "more or less permanently attached" to the M/V CAPTAIN MOST*, he cannot satisfy the definition of "master or member of a crew" under the LHWCA. (citation omitted; emphasis supplied).

Id. at 1191 n. 2.

Another significant decision involving a maritime pilot is *Ray v. Great Lakes Towing Co.*, No. 3: 92 Civ. 7034 (N.D. Ohio February 25, 1992). The *Ray* court expressed puzzlement that although the District Court in *Evans* (the case at bar) recognized that *Griffith v. Wheeling Pittsburgh* sets out the Jones Act test used in the Third Circuit, the district court's decision in *Evans* runs counter to the jurisprudence.

The *Ray* court noted that the **Sixth Circuit** in *Boyd v. Ford Motor*, 948 F.2d 283 (6th Cir. 1991), accepted that *McDermott* did not impinge on the permanent or substantial vessel-connection analysis of the Jones Act seaman status test used in the 6th Circuit. The *Ray* court concluded that the plaintiff, a river pilot, was not a Jones Act seaman.

Stoller v. Evergreen Int'l (U.S.A.) Corp., C92-0466 FMS (N.D. Cal. Sept. 1, 1992), also denied Jones Act status to a pilot. The pilot *unsuccessfully* argued his connection with shipowner's vessel was "more or less permanent" or alternatively, there was a permanent connection to the *port pilot boats* (water taxis to take him to and from assigned vessels) which would satisfy this requirement. Neither argument worked. On shipowner's summary judgment motion in *Stoller*, the court was satisfied that there was no employment relationship between pilot and shipowner. The *Stoller* court understood "employment-related connection" to the vessel as used in *McDermott*, only to mean an "obligation to forward her enterprise," which is in total accord with our explanation above.

The 5th Circuit in *Easley v. Southern Shipbuilding Corp.*, 965 F.2d 1 (5th Cir. 1992) and *Campo v. Electro-Coal Transfer Co.*, 970 F.2d 51 (5th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 1262 (1993), *reh'g denied*, __ U.S. __, 113 S. Ct. 1883 (1993) never doubted that vessel-connection was a *sine qua non* in establishing Jones Act seaman status. In *Easley*, the 5th Circuit stated:

> "[J]ust as the worker's performance of non-maritime work does not prohibit seaman status [referring to third element of the above test], his performance of traditional maritime work does not confer seaman status. . . . Easley did not have the "employment-related connection to a vessel in navigation" required by *Wilander*. . . . Irrespective of the traditional maritime nature of Easley's work. . . , the irregularity of his intermittent stints of

> short duration on that vessel eschews the substantial and enduring relationship to the vessel envisioned in *Gizoni*, *Wilander*, and *Lawson*. . . . To understand fully the concept of "employment-related connection to a vessel in navigation," we look to this Circuit's traditional definition of a Jones Act seaman announced decades ago in *Offshore Co. v. Robison*. To be covered as a seaman under the Jones Act, a worker must: (1) be permanently assigned to a vessel in navigation or perform a substantial part of his work on the vessel; and (2) contribute to the mission of the vessel. Easley was not permanently assigned to the No. 6; . . . . Neither did he perform a substantial part of his work on the vessel. Clearly neither *Robison* nor *Wilander* and *Gizoni* envision a "snapshot" test for seaman status, inspecting only the situation as it exists at the instant of injury; a much more enduring relationship is contemplated in the jurisprudence. . . ."

Easley, 965 F.2d at 4.

In *Campo*, 970 F.2d at 52-53, the Fifth Circuit stated:

> "[I]n order to bring a claim under the Jones Act, Campo must show that (1) he was *permanently assigned to a vessel or fleet or performed a substantial part of his work on the vessel or fleet*; and (2) his work contributed to the mission of the vessel or fleet. Whether the plaintiff relied upon establishing a permanent assignment or substantial work performance, he must show a connection to a vessel or fleet of vessels in order to satisfy the first prong of the *Robison/Barrett* test. *See, Buras v. Commercial Testing and Engineering Company*; *Guidry v. Continental Oil Co.* . . . A fleet is "an identifiable group of vessels acting together or under one control. We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard. *Barrett*. Campo has failed to identify a group of vessels to which he was permanently assigned

> or on which he performed a substantial amount of work. . . . This grouping fails as a fleet for two reasons. First, Campo did not establish control of these three groups of vessels. Second, Campo was randomly assigned to vessels that entered the terminal, without regard to ownership, and not all of the vessels were owned or controlled by these three companies. It is well established that a large number of variously owned and controlled vessels does not constitute a fleet. *See, e.g., Langston v. Schlumberger Offshore Servs.*; *Buras*; *Guidry*. Since Campo has not shown a relationship to a fleet of vessels, he does not qualify as a Jones Act seaman." (citations omitted, emphasis supplied).

In *Gibson v. TCB Industries, Inc.*, No. 1993 U.S. Dist. LEXIS 7012, *12 (E.D. La. May 17, 1993), plaintiff claimed that the *McDermott* case prevented the defendant from succeeding on its summary judgment motion. The Court noted:

> The Court in *Wilander* stated that 'the question in this case is whether one must aid in the navigation of a vessel in order to qualify as a 'seaman' under the Jones Act.'(citation omitted) That question only concerns the second prong of *Robison*, which requires that a seaman's duties 'contribute to the function of the vessel or to the accomplishment of its mission.' However, both *Robison* prongs must be satisfied before a plaintiff can prevail on the issue of seaman status in this Circuit.(citation omitted) Nothing in the *Wilander* Court's decision has any impact on the Fifth Circuit cases which address *Robison's* first prong.

Set forth hereunder, in summary fashion, are the holdings in some of the numerous **post**-*McDermott* cases which confirm that *McDermott* did not abolish the essential vessel-connection requirement to prove Jones Act status and there is

absolute consistency among the Circuit Courts and state courts:

Coats v. Penrod Drilling Corp., 5 F.3d 877 (5th Cir. 1993);

Michel v. Total Transp., Inc., 957 F.2d 186 (5th Cir. 1992);

Kathriner v. Unisea, Inc., 975 F.2d 657 (9th Cir. 1992);

Easley v. Southern Shipbuilding Corp., 965 F.2d 1 (5th Cir. 1992);

DiGiovanni v. Traylor Bros., 959 F.2d 1119 (1st Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 87 (1992);

Palmer v. Fayard Moving and Transp., 930 F.2d 437 (5th Cir. 1991);

Taylor v. Cooper River Constructors, 830 F. Supp. 300 (D.S.C. 1993);

Coker v. Best Workover, Inc., No. 92-3123, 1993 U.S. Dist. LEXIS 10668 (E.D. La. July 23, 1993);

Gibson v. TCB Enterprises, Inc. No. 91-3941 (E.D. La. May 17, 1993);

Higginbotham v. Monteiro Contractors, Inc., No. 92-2664, 1993 U.S. Dist. LEXIS 6923 (E.D. La. May 13, 1993);

Newsom v. Continental Grain Company, 820 F. Supp. 1187 (D. Minn. 1993);

Roy v. Bethlehem Steel Corp., No. 1:92-CV-376, 1993 U.S. Dist. LEXIS 1647 (E.D. Tx. Oct. 1, 1993);

Leotis v. City of New York, 818 F. Supp. 63 (S.D.N.Y. 1993);

Pearson v. Offshore Specialty Fabricators, Inc., No. 91-3350, 1992 U.S. Dist. LEXIS 15246 (E.D. La. Oct. 6, 1992);

Pickett v. C&B Fabricators, Inc., No. 92-3470, 1992 WL 233770 (E.D. La. Aug. 29, 1992);

Tuckson v. Bunge Corp., No. 91-2794, 1992 WL 189502 (E.D. La. July 24, 1992);

Barron v. Thunder Bay Offshore, Inc., No. 92-0358, 1992 WL 211704 (E.D. La. Aug. 13, 1992);

Ralleigh v. Gulf Island IV, Inc., No. 91-1305, 1992 U.S. Dist. LEXIS 9547 (E.D. La. June 19, 1992);

Olene v. Otto Candies, No. A90-213 Civil, 1992 WL 80812 (D. Alaska 1992);

Bolden v. Offshore Express, 1992 A.M.C. 2043, 2046 (E.D. La. 1992);

Navarro v. Eckstein Marine Servs., No. 91-1056, 1992 U.S. Dist. LEXIS 177 (E.D. La. Jan. 2, 1992);

Davis v. Odeco, No. 91-1694, 1992 U.S. Dist. LEXIS 5399 (E.D. La. Apr. 13, 1992);

Echols v. Elf Aquitane Exploration, Inc., 1992 A.M.C. 2760 (S.D. Tx. 1992);

Johnnie v. Nana Development Corp., 780 F. Supp. 669 (D. Alaska 1991);

Bozeman v. Ensco Drilling Co., No. H-91-734, 1991 WL 216911 (S.D. Tx. Aug. 27, 1991)

Menard v. Brownie Drilling Co., No. 90-2559, 1991 WL 111028 (E.D. La. 1991);

Haynie v. Dynamic Offshore Contractors, No. 89-4552, 1991 WL 87949 (E.D. La. 1991);

Ashley v. Epic Divers, 818 F. Supp. 172 (E.D. La. 1991), *aff'd mem.*, 976 F.2d 730 (5th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct 1415 (1993);

Maze v. "Aleutian Key", 1992 A.M.C. 1539 (E.D. La. 1991), *aff'd mem. sub nom., Maze v. Key*, 974 F.2d 172 (5th Cir. 1992);

Dean v. McKie, 771 F. Supp. 466 (D. Mass. 1991);

Trahan v. Thenamaris Ship Management, Inc., 614 So. 2d 362 (La. Ct. App. 3d Cir. 1993);

Theriot v. McDermott, Inc., 611 So. 2d 129 (La. Ct. App. 1st Cir. 1992), *cert. denied*, 615 So. 2d 342 (La. 1993);

Texaco, Inc. v. Addison, 613 So. 2d 1193 (Miss. 1993);

Machado v. George R. Brown Partnership, John Marceaux, & McMahan Construction, Inc., No. C14-92-00933-CV, 1993 Tex. App. LEXIS 1855 (Tex. Ct. App. July 1, 1993).

It is submitted, that there is no confusion in either the Circuit or State Courts concerning the Jones Act status of a pilot and that the *McDermott* decision did not leave any gaps or create any confusion in the law as to the status of a pilot.

III. PILOTS DO NOT HAVE TO BE CLASSIFIED AS JONES ACT SEAMEN OR LONGSHORE/HARBOR WORKERS; THEY MAY BE CLASSIFIED AS SEAMEN UNDER THE GENERAL MARITIME LAW

Petitioner has misled this Court with his third Question Presented by implying that the cases hold that pilots must be classified as either Jones Act seamen or longshore/harbor workers in order to receive protection under the law. Maritime workers not entitled to bring a claim either under the Jones Act or the Longshore and Harbor Workers Compensation Act are able to bring an action under the general maritime law. This action may include general negligence and unseaworthiness. In *Mahramas v. Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2d Cir. 1973), the Second Circuit considered the appeal of a plaintiff-employee who was injured aboard a ship

but was not employed by the shipowner and was not covered by the Longshore and Harbor Worker's Compensation Act. The Second Circuit stated that "[A]t the outset, it should be noted that there is no question raised concerning the propriety of the plaintiff's actions against the shipowner for unseaworthiness and general negligence. The duty to provide a seaworthy ship extends not only to the owner's employees but to all 'who perform the ship's service . . . with his consent or by his arrangement.' *Seas Shipping Co. v. Sieracki*, 238 U.S. 85 (1946)" *Mahramas*, 475 F.2d at 169. *See McMahon, Jr. v. M/V TOMIS SEA, Hong Fat Shipping & Yick Fung Shipping & Enterprise Company*, No. 92-2368 C/W 9-3314, 1993 U.S. Dist. LEXIS 7894 (E.D. La. May 28, 1993) ("The Fifth Circuit has not foreclosed the right of some claimants who are not Jones Act seamen, and who are not covered by the LHWCA, to maintain a claim for unseaworthiness against a vessel owner. . . ." (citation omitted)). Outside the ambit of the Jones Act, the general maritime law still applies. *McAleer v. Smith*, 818 F. Supp. 486 (D.R.I. 1993).

Maritime workers do not have to be classified as either Jones Act seamen or longshore/harbor workers entitled to protection under the LHWCA unless they meet the requirements to be classified as such; they may sue as seamen under the general maritime law.

CONCLUSION

The decision of the Third Circuit is consistent with all other United States Courts of Appeals' requirements for bringing a Jones Act claim. Furthermore, the Third Circuit's decision is in accord with this Court's decision in *McDermott v. Wilander*, 498 U.S. 337 (1991). For the reasons discussed above, respondent, United Arab Shipping Company S.A.G., respectfully submits that this Court should deny petitioner's petition for a writ of certiorari.

Respectfully submitted,

CARY ROBERT WIENER
Counsel of Record
LESLIE ANN MYROW
SABURABI N. IBRAHIM
KIRLIN, CAMPBELL, MEADOWS
& KEATING
14 Wall Street
New York, New York 10005
(212) 732-5520

Attorneys for Respondent